

UNITED STATES DEPARTMENT OF COMMERCE National Oceanic and Atmospheric Administration

NATIONAL OCEAN SERVICE
OFFICE OF OCEAN AND COASTAL RESOURCE MANAGEMENT
Silver Spring, Maryland 20910

January 28, 2005

Mr. Thomas E. Irwin, Commissioner Alaska Department of Natural Resources 550 West 7th Avenue, Suite 1400 Anchorage, Alaska 99501-3650

Dear Commissioner Irwin:

Thank you for submitting the revised proposed Alaska Coastal Management Program (ACMP) document, received on December 17, 2004, for consideration as a program amendment under the Coastal Zone Management Act (CZMA) (December 17 ACMP Document). Since receipt of the December 17 ACMP Document, the Office of Ocean and Coastal Resource Management (OCRM) and Alaska Department of Natural Resources (DNR) staff have worked together and made significant progress in addressing several issues regarding the approval of the ACMP amendment. This letter, with enclosures, provides further comments regarding: your December 16, 2004, letter; CZMA approval issues; and scheduling/timing issues. OCRM is committed to working with the state to meet the objectives of Alaska House Bill 191 (HB 191) and the CZMA.

Alaska's December 16, 2004, Letter

I would like to briefly clarify some of the process issues concerning OCRM's preliminary approval decision raised in your December 16, 2004, letter. Alaska's first program amendment submission, dated September 30, 2004, was received in OCRM on October 5, 2004, and is referred to in OCRM's administrative record as the October 5 ACMP Document. Alaska's second program amendment submission, dated December 16, 2004, was received on December 17, 2004, and is referred to in OCRM's administrative record as the December 17 ACMP Document. On October 8, 2004, OCRM determined that the October 5 ACMP Document was insufficient. OCRM's letter dated November 4, 2004, provided Alaska with detailed comments and required improvements. Notwithstanding the October 8 determination of insufficiency, based on assurances from Alaska of timely resubmission of an improved amendment, on November 4, 2004, OCRM started the 120-day amendment approval time period in accordance with CZMA section 306(e).

As stated in OCRM's November 4, 2004, letter, OCRM continues to work diligently to collect information and data necessary to comply with the National Environmental Policy Act (NEPA). After the state submits to OCRM an ACMP document that resolves the issues identified in this letter and enclosures and proposed regulations revising the ACMP as recommended in this letter, OCRM will be able to begin the NEPA scoping process. After Alaska holds a public hearing on the ACMP amendment pursuant to CZMA section 306(d)(4) (that can be held in conjunction with OCRM's NEPA scoping meeting), OCRM will be in a position to make a preliminary approval decision and provide a more certain schedule to complete the NEPA process, pursuant to 15 CFR § 923.82(c). Therefore, pursuant to CZMA section 306(e)(2) (16 USC 1455(e)(2)), OCRM extends the ACMP amendment review period until the NEPA process is complete and its final record of decision on the ACMP program amendment request is issued.





CZMA Approval Issues

The enclosures provide detailed explanations of the remaining approval issues, briefly described below. OCRM must be satisfied that the state has addressed these issues before OCRM can initiate the NEPA process or make a preliminary approval decision.

1. Application of District Policies and Designated Areas. Revisions must be made to ACMP regulations or the ACMP document to address CZMA approval issues concerning the following policies or policy areas: subsistence use policy; natural hazards area policy; important habitat policy; recreational use areas; tourism use areas; commercial fishing and seafood processing facilities sites; major energy facilities sites policy; and the important history or prehistory areas.

OCRM proposes these changes to ensure the ACMP regulations comply with the objectives of the CZMA and apply the federal consistency requirement to designated areas. The ACMP must address effects to those uses and resources identified by the ACMP and not be limited to the location of a project. See e.g., 16 USC §§ 1452(2)(A), (C), (J), 1452(4), 1452(6), 1456(c)(1) and 1456(c)(3)(A); 15 CFR §§ 923.3(b), 923.11(b), and 15 CFR part 930. Enclosures I and III discusses this concern in detail.

- 2. Compliance with Local Government Implementation Requirements Technique A. The ACMP as drafted does not comply with two of the five Technique A requirements for district implementation of ACMP policies. (When a state chooses to implement part of its coastal management program through local government implementation, the state must meet five requirements to ensure the local plans are enforced, under "Technique A" regulations at 15 CFR § 923.42.) The state is not able to assure that coastal management decisions will comply with ACMP enforceable policies during the development of local programs, pursuant to 15 CFR § 923.42(b)(2). Also, the state is not able to assure that coastal management decisions will comply with ACMP enforceable policies if a district fails to adopt a plan, pursuant to 15 CFR § 923.42(b)(3). Enclosure II discusses this concern in detail.
- 3. Scope and Content of District Plans. The ACMP does not clearly articulate the new role for district programs. The regulations and ACMP document must provide clear guidance to the districts and other affected interests on the scope and content of district programs and policies, including the "flow from" principle in 11 AAC 114.270(a)(1), which plays an important role in describing the parameters of district policies. The ACMP should consult with OCRM, districts, and other affected parties as part of any effort to amend this rule. A key program approvability requirement is that state coastal programs must provide a "clear understanding of the content of the program, especially in identifying who will be affected . . . ," and a "clear sense of direction and predictability for decision makers who must take actions pursuant to or consistent with the management program." 15 CFR § 923.3(e)(1) and (2). Enclosure IV discusses this concern in detail.
- 4. Habitats Policy. The ACMP habitats policy at 11 AAC 112.300 does not include clear mechanisms for the comprehensive management of fish and wildlife habitat, including the resolution of conflicts among competing uses of habitat. First, the standards proposed in the first part of the policy do not address impacts to the biological and other functions of habitat, and they apply only to specified geographic locations. Second, the criteria for designation of "important"

habitat" areas to which broader habitat standards may apply lacks clarity, definition, and consistency with accepted scientific terminology and concepts. Changes are needed to comply with CZMA requirements including the scope of state enforceable policies. *See* 16 USC § 1452(2)(A), and 15 CFR §§ 923.3(b), 923.3(c), 923.3(d) and (e), and 923.40. Enclosure V discusses the habitat issues in detail.

Scheduling/Timing Issues

With respect to scheduling issues, it is important to have a mutual understanding of the effect of the July 1, 2005, deadline established by HB 191. We would like to summarize our understanding of the deadline. A detailed discussion of the deadline and possible alternatives is contained in Enclosure VIII, as well as a tentative schedule for completing the ACMP amendment approval process.

OCRM understands that DNR has concluded that if OCRM has not approved the ACMP amendment by July 1, 2005, the state will have no enforceable ACMP standards, because the old ACMP standards (6 AAC 80) will no longer be effective and the new ACMP standards (11 AAC 112) will not be effective until approved by OCRM. Therefore, after July 1, 2005, the federally approved ACMP would consist of only the district plans and district enforceable policies already approved by OCRM. While the ACMP amendment is in transition toward approval, OCRM believes the ACMP could continue to receive CZMA grants, fund efforts to revise the ACMP and district plans, and use the districts' enforceable policies for state and federal consistency reviews.

While both OCRM and DNR have worked diligently and made significant strides to complete review of the ACMP amendment, OCRM will not, despite its best efforts, be able to complete its review and NEPA analysis by July 1, 2005. The magnitude of the changes proposed for the ACMP regulations, the necessity to develop a revised program document, and the absence of complete district plan guidance raise significant CZMA approvability and NEPA issues. These issues are not easily addressed within the compressed time period established by state law. In fact, OCRM has not been able to issue preliminary approval or initiate the NEPA process because the proposed ACMP revisions and explanations are still in a state of flux. I am pleased, however, that there appears to be agreement between our offices that DNR will further amend the ACMP regulations to address some of the CZMA approval issues.

In addition, while DNR has provided opportunities for district and public input, OCRM believes that our combined efforts to meet the July 1, 2005, deadline, have limited the ability to have a broader dialogue between DNR, the districts and other affected parties on the content and scope of the new ACMP. As a result, district and public understanding of the proposed ACMP has suffered. Of particular concern is the difficulty districts have encountered in their efforts to revise district plans to meet the deadline. The state and OCRM need to agree on tasks and a process leading to ACMP approval and then set revised goals and deadlines. Assuming DNR submits the proposed regulatory changes and revised ACMP document, as described in this letter and enclosures, in February, OCRM anticipates a program amendment decision date around December 31, 2005.

In order to address these timing concerns, OCRM recommends that the state continue to rely on the old ACMP regulations previously approved by OCRM, and not just district plans and policies, during completion of the ACMP amendment approval process. This would require the state legislature to either remove or extend the July 1, 2005, deadline in HB 191, Sec. 49. OCRM also recommends that the statutory deadline for submitting district plans be extended until the final ACMP approval requirements

have been completed, pursuant to HB 191, Sec. 47(a), so that districts and other affected parties clearly understand the districts' role.

Another issue related to scheduling matters is the state's question of whether OCRM can grant "interim" or "conditional" approval of the ACMP while the ACMP amendment is being processed. As discussed with DNR staff, OCRM may not grant interim or conditional approval. The CZMA does not provide authority to grant an interim or conditional approval of a coastal management program or an amendment to a program. Instead, the CZMA provides specific authority for "preliminary approval" of program amendments. The effect of preliminary approval is to allow the continued use of CZMA funds to implement the proposed amendment during the CZMA approval process, but for no longer than six months. The CZMA authorizes a preliminary approval when OCRM determines the amendment "is likely to meet the approval standards in this section [306(d)]" 16 USC § 1455(e). Finally, the CZMA provides certainty to federal agencies and other affected interests by not authorizing an amendment that has received preliminary approval to be used for federal consistency purposes.

Conclusion

Although the December 17 ACMP Document is improved in many ways over the earlier submission, revisions are still needed to provide a sufficient description of the ACMP so that affected parties can determine the nature and scope of the changes to the program. Until such revisions are made, OCRM is unable to either provide preliminary approval or begin its NEPA review process. To address deficiencies within the existing document, OCRM offers specific guidance as described in the enclosures. Additionally, OCRM urges the State to take necessary action in addressing the July 1, 2005, deadline, in order to both ensure continuity of Alaska's existing program and sufficient time to carefully and comprehensively review the state's program amendment submission.

We look forward to continue working with your staff on this amendment request. Please contact me or Bill Millhouser, at 301-713-3155, extension 189, if you have any questions.

Sincerely,

Eldon Hout Director

Enclosures

cc:

Bill Jeffress, Director, OPMP

Randy Bates, ACMP Program Manager John Katz, Alaska Washington, D.C. office

State Representative Paul Seaton